ORIGINAL (2)

Supreme Court, U.S.
FILED
JUN 26 1995
OFFICE OF THE CLERK

NO. 94-1973

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SECRETARY OF NEW MEXICO DEPARTMENT OF CORRECTIONS;
DERALD KERBY, WARDEN, CENTRAL NEW MEXICO
CORRECTIONAL FACILITY, PETITIONERS

v.

WILLIAM SMITH, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293
By: Stephen P. McCue
Attorney for Petitioner

SERVICE TO:

Margaret McLean
Asst. Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508

June, 1995

RECEIVED
JUN 30 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

18 pp

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATEMENT 1

ARGUMENT 5

I. THE ISSUES RAISED BY THE STATE IN ITS PETITION FOR WRIT OF CERTIORARI WERE NOT PRESENTED TO THE DISTRICT COURT OR THE COURT OF APPEALS AND ARE NOT PROPERLY BEFORE THIS COURT. 5

II. THIS COURT SHOULD NOT ALTER ITS PRIOR CONCLUSION THAT IT IS UP TO CONGRESS, IF IT SO CHOOSES, TO PROVIDE FOR A DEFENSE TO HABEAS CORPUS ACTIONS BASED ON DIFFICULTIES THE STATE MAY FACE IN RETRIAL OF HABEAS PETITIONERS. 8

III. THIS COURT SHOULD NOT ALTER ITS PRIOR CONCLUSION THAT COURTS OF APPEALS MAY CONSIDER THE QUESTIONS OF PROBABLE CAUSE AND THE MERITS TOGETHER. 9

CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Cases

Application of Burwell,
350 U.S. 521 (1956) 10, 11

Barefoot v. Estelle,
463 U.S. 880 (1970) 10

Brady v. Maryland,
373 U.S. 83 (1963) 3

Garrison v. Patterson,
391 U.S. 464 (1968) (per curiam) 9

Nowakowski v. Maroney,
386 U.S. 542, 543 (1967) (per curiam) 11

Smith v. Secretary of New Mexico Department of Corrections,
50 F.3d 801 (10th Cir. 1995) 2

Vasquez v. Hillery,
474 U.S. 254 (1986) 8, 9

Constitutional and Statutory Provisions

28 U.S.C. 1254(1) 1

28 U.S.C. § 2253 10

28 U.S.C. 2254 2

Rules of Procedure

Rule 9(a) of the Rules Governing § 2254 Proceedings 6

Respondent, William Smith, submits the following brief in opposition to the petition for writ of certiorari filed by the secretary of New Mexico Department of Corrections and Derald Kerby, warden, Central New Mexico Correctional Facility.

OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-79, is reported at 50 F.3d 801.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1995. The petition for writ of certiorari was filed on June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Mr. Smith was convicted of the August 9, 1977, murders of two young women, Cari Talton and Leslie McDonnell, whose bodies were found in a corral in rural Torrance County, New Mexico. A2-3[1]. Mr. Smith's first trial ended in a mistrial when the jury was unable to agree on a verdict; his second trial ended in his conviction on two counts of first degree murder. The state district court sentenced him to two consecutive terms of life imprisonment. On direct appeal, the New Mexico Supreme Court upheld Mr. Smith's convictions.

---

[1] The Tenth Circuit opinion in this case is attached as Appendix A to the State's petition for writ of certiorari and numbered A1 through A79. Respondent cites herein to the opinion as numbered in State's Appendix A.

On April 4, 1983, Mr. Smith filed a motion for a new trial in the state district court on the grounds that the State failed to disclose exculpatory evidence and that he received ineffective assistance of counsel at trial and on appeal. Following an extensive evidentiary hearing, the district court issued findings of fact and conclusions of law and denied the motion.

Mr. Smith filed a petition under 28 U.S.C. § 2254 in the United States District Court for the District of New Mexico on March 3, 1988, again raising the grounds of failure of the State to disclose exculpatory evidence and ineffective assistance of counsel at trial and on appeal. On May 24, 1993, the United States Magistrate issued proposed findings and recommended that the petition be dismissed with prejudice. The United States District Judge adopted the Magistrate's proposed findings, dismissed the petition with prejudice, and later entered an order that no certificate of probable cause for appeal be issued. The Tenth Circuit issued a certificate of probable cause for appeal and vacated Mr. Smith's convictions on the ground that the State violated his due process right to a fair trial by failing to disclose a number of items of material evidence favorable to the defense.

The facts of this case were recounted at considerable length in the court of appeals' opinion in Smith v. Secretary of New Mexico Department of Corrections, 50 F.3d 801 (10th Cir. 1995). The murders were investigated by officials in both Torrance County and Bernalillo County, New Mexico, the place of residence

of the victims. A5. The Torrance County investigation focused on "Randy" Newell[2], Talton's live-in boyfriend. The Bernalillo County investigation focused on Mr. Smith. A5, 14. The prosecution obtained an indictment against Mr. Smith from the grand jury in Bernalillo County.

The Tenth Circuit determined that the following items of material evidence favorable to the defense were not disclosed to Mr. Smith in violation of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny:

1. Two Police Reports. The first report concerned two police stops of "Randy" Newell near the corral where the victims' bodies were found shortly after the murders; the discovery of women's clothing in his car that appeared to have blood and hair on them[3] and men's clothing with stains that were possibly blood; "Randy" Newell's status as a suspect in the murder investigation and the fact that he had recently been involved in a fight with Talton in which she had stabbed him. A15-16, 62. The second

---

[2] "Randy" Newell was actually Samuel Newell. The real Randy Newell was the brother of Samuel Newell. A3, n.3.

[3] As the Tenth Circuit noted in its opinion, Talton's body was found naked. While jeans and a T-shirt were found near the body, no underwear was found. Both victims were shot in the head; Talton also had a pelvic gunshot wound directly over a professional tattoo that Dr. Gauthier of the State Medical Examiner's Office testified was inflicted intentionally. A3-4, 30. The pelvic wound was on Talton's right side, the same side as the stains found on the underwear in Newell's car.

report indicated that "Randy" Newell was actually Samuel Newell.[4] A66.

2. The fact that "Randy" Newell was actually Samuel Newell. A police detective testified at Mr. Smith's postconviction hearing that he told one of the prosecutors sometime before the end of Mr. Smith's second trial[5] that "Randy" Newell was actually Samuel Newell and provided them the rap sheet indicating Samuel Newell's record. While prosecutors denied having been so informed, the Tenth Circuit concluded that the knowledge of an investigative arm of the state is imputed to the prosecution under Brady. A67-70.

3. The existence of the apparently bloody clothes found in Newell's car. Prosecutors personally examined the apparently bloody clothes discovered in Newell's car[6]. A71. Pursuant to their "open file" policy, they put the clothing in the evidence room with a tag that merely stated, "Articles from vehicle accident." A73. The defense was not informed of the existence of the clothes or given the opportunity to test them. A74. The Tenth Circuit declared, "Our de novo review of the entire record in this case convinces us the result of the proceeding could

---

[4] "Randy" Newell testified at Mr. Smith's trial and lied about his identity.

[5] Mr. Smith's first trial ended in a mistrial when the jurors were unable to agree on a verdict.

[6] The women's underwear found in Newell's car was never tested to confirm the presence of blood. A30. Tests on the men's clothing were negative for blood; however those tests were of questionable reliability. A17-18.

reasonably have been different had the clothes taken from Mr. Newell's car been disclosed to the defense." Id.

4. "Randy" Newell's statements. The State conceded its obligation to produce the prior statements of a witness. While Newell's statements were not a part of the record in this case, the Tenth Circuit noted that they apparently included Newell's claim that the blood stains on the women's underwear found in his car were menstrual blood.[7] A76, n.48.

The court of appeals determined, in light of the "entirely circumstantial", A77, case against Mr. Smith, that there was a reasonable probability that the outcome of the trial would have been different if the prosecution had disclosed the above-discussed items of evidence. A77-78. The court concluded that the failure to disclose material exculpatory evidence violated Mr. Smith's constitutional due process right to a fair trial. Id. Petitioners do not challenge that holding here.

ARGUMENT

I. THE ISSUES RAISED BY THE STATE IN ITS PETITION FOR WRIT OF CERTIORARI WERE NOT PRESENTED TO THE DISTRICT COURT OR THE COURT OF APPEALS AND ARE NOT PROPERLY BEFORE THIS COURT.

Neither of the issues asserted by petitioners in their petition for writ of certiorari were preserved for review by this

---

[7] Newell told Virginia Ferrara, one of the prosecutors at Mr. Smith's trial, that the stains were menstrual blood; she did not believe that was true, as the stains were on the right front portion of the underwear and not in the area where menstrual blood would ordinarily be found. A29-30.

Court. Petitioners failed to raise these issues during any previous stage of the protracted litigation in this case.

Petitioners have not argued previously that they were prejudiced in their ability to retry Mr. Smith or that the courts should consider that factor. The court of appeals pointed out that although prejudice was not an issue in this case, Rule 9(a) of the Rules Governing § 2254 Proceedings affords an equitable defense to unjustifiably delayed petitions.[8] The State in this case did not assert that defense and therefore waived it. A44, n.30.

The State has never sought to establish the factual predicate for its claim of prejudice in retrying Mr. Smith. It has never attempted to demonstrate what evidence or which witnesses it can no longer locate. Clearly, one reason for the "practical inability of the State of New Mexico to retry Smith" Application for Stay at 5, is that the disclosure of exculpatory evidence considerably weakens the State's "entirely circumstantial", A77, case against Mr. Smith. The court of appeals noted in its opinion that one of the prosecutors who obtained Mr. Smith's convictions expressed doubt that those convictions would have been possible if the items that the Tenth Circuit determined should have been disclosed had actually been

---

[8] The court of appeals recognized, in accordance with this Court's decision in Vasquez v. Hillery, 474 U.S. 254, 265 (1986), that the prejudice inquiry under Rule 9(a) is limited to prejudice in the State's ability to respond to the allegations in the petition because of petitioner's delay in filing it, and not prejudice to the State's ability to retry the petitioner. A44, n.30.

disclosed. A78. Further, the court of appeals determined that there was a reasonable probability that Mr. Smith would not have been convicted if the prosecution had fulfilled its constitutional obligation to disclose material exculpatory evidence. A77-78.

There has been no judicial determination of prejudice to the State in its ability to retry Mr. Smith, of dilatory conduct on the part of Mr. Smith, or of a causal relationship between delay attributable to Mr. Smith and prejudice to the State.[9] In fact, the court of appeals declared, "we do not believe the lapse of time in bringing the federal petition in this case was either inexcusable or inordinate."[10] Id. Accordingly, the prejudice issue has been neither factually established nor legally preserved.[11]

The issue concerning the certificate of probable cause arose only at the court of appeals level. The State failed to raise

---

[9] As the court of appeals noted in its opinion, "Randy" Newell died of an apparent drug overdose four days before Mr. Smith was to be sentenced. A23-24. Because he died before completion of the primary proceedings herein, his unavailability and any resulting prejudice to the State could not be shown to be causally related to delay on the part of Mr. Smith.

[10] The court of appeals faulted the two federal magistrate judges who handled this case for unreasonable delay.

[11] Even if there was a state defense based on prejudice at retrial and even if petitioners could establish that Mr. Smith engaged in dilatory conduct resulting in such prejudice, dismissal of a potentially meritorious petition would be discretionary. Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986) (plurality opinion) (where prisoner "engages in ... conduct that 'disentitle[s] him to the relief he seeks,' the federal court may dismiss the subsequent petition....") (emphasis added; citing Sanders v. United States, 373 U.S. 1, 17-19 (1963)).

the issue there by way of a motion, briefs, or petition for rehearing. Because the court of appeals has not been afforded the opportunity to address the State's challenge to issuance of the certificate of probable cause in this case, the issue is not properly before this Court.

II. THIS COURT SHOULD NOT ALTER ITS PRIOR CONCLUSION THAT IT IS UP TO CONGRESS, IF IT SO CHOOSES, TO PROVIDE FOR A DEFENSE TO HABEAS CORPUS ACTIONS BASED ON DIFFICULTIES THE STATE MAY FACE IN RETRIAL OF HABEAS PETITIONERS.

Petitioners fail to point out in their petition for writ of certiorari that, in Vasquez v. Hillery, 474 U.S. 254 (1986), this Court squarely addressed the issue of a habeas corpus defense based upon prejudice to the state at retrial of successful habeas petitioners. Id. at 264-65. It concluded that "[s]ound jurisprudence counsels against our adoption of that approach to habeas corpus claims." Id. That conclusion is no less apropos today.

This Court noted in Vasquez that Congress had provided neither for a statute of limitations for federal habeas corpus actions nor for a defense to habeas corpus actions for states based on the difficulties posed by retrials. At that time, a congressional committee was considering a draft proposal that provided for such a defense; similar proposals are being debated in Congress at present. This Court determined that congressional legislation, rather than a new judicial rule, is the appropriate

avenue to the relief petitioners seek here by way of a writ of certiorari.

Petitioners advance no legal justification for this Court to reconsider its decision in Vasquez. They cite no conflict among the circuits on this question. They cite no authority supporting judicial creation of a state defense of prejudice at retrial.

Petitioners discuss at length the interests of society, the State of New Mexico, and the families of victims Talton and McDonnell in the finality of Mr. Smith's convictions. Petition for Writ of Certiorari (hereafter "pet.") 10-14. What they fail to discuss is the court of appeals' ruling, not challenged here, that Mr. Smith's trial was unfair due to the State's failure to disclose material evidence favorable to the defense. There is no legitimate interest in the finality of a conviction that was unfairly obtained.

III. THIS COURT SHOULD NOT ALTER ITS PRIOR CONCLUSION THAT COURTS OF APPEALS MAY CONSIDER THE QUESTIONS OF PROBABLE CAUSE AND THE MERITS TOGETHER.

On page 16 of their petition, petitioners erroneously quote Garrison v. Patterson, 391 U.S. 464 (1968) (per curiam), for the proposition that a certificate of probable cause must ordinarily be issued before the appeal can proceed. This Court made no such pronouncement in Garrison. In fact, this Court stated that "nothing we say here prevents the courts of appeals from considering the questions of probable cause and the merits together. . . " Id. at 466. This Court's holding in Garrison

was that, having issued a certificate of probable cause, courts of appeals must afford appellants the opportunity to address the underlying merits of their appeals.

Congress provided in 28 U.S.C. § 2253 that:

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

The court of appeals' issuance of a certificate of probable cause in this case in no way violates § 2253. The Tenth Circuit recognized that issuance of a certificate of probable cause herein was a jurisdictional prerequisite to appeal, A40, and that a petitioner is entitled to the certificate only upon a "substantial showing of the denial of an important federal right." A41. The court properly applied the standard enunciated by this Court in Barefoot v. Estelle, 463 U.S. 880 (1970) (a certificate of probable cause for appeal should issue where " . . . the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" Id. at 893 n.4 (emphasis in original) (citation omitted)).

In Application of Burwell, 350 U.S. 521 (1956), this Court declared that it would not attempt to establish a procedure for courts of appeal to entertain applications for certificates of probable cause. 28 U.S. C. § 2253 vests circuit courts with discretion. Id. Actions with respect to issuance of

certificates of probable cause are nonreviewable so long as they remain "within the bounds of judicial discretion." Id.

Petitioners have failed to demonstrate that the Tenth Circuit's issuance of a certificate of probable cause in this case was outside the bounds of judicial discretion. Obviously, there was probable cause for appeal herein. Mr. Smith not only made a substantial showing that he had been denied a federal right; he proved it and prevailed on the merits.

In arguing that the Tenth Circuit does not exercise discretion in reviewing habeas corpus cases following denial of a certificate of probable cause by the district court, Pet. 15, petitioners seek this Court's review of an issue not presented by this case. There is no indication that the court of appeals failed to give "weighty consideration", Nowakowski v. Maroney, 386 U.S. 542, 543 (1967) (per curiam), to the district judge's denial of a certificate of probable cause; it merely disagreed with his decision.

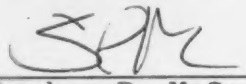
Petitioners have shown no conflict between the circuits with respect to issuance of certificates of probable cause. The Tenth Circuit acted well within the bounds of its discretion in this case. It concluded that Mr. Smith had been denied his constitutional due process right to a fair trial. While petitioners are displeased with that outcome, their petition for writ of certiorari fails to demonstrate any flaw in the court of appeals' procedure.

CONCLUSION

In light of petitioners' failure to preserve the issues raised in the petition for writ of certiorari and this Court's prior decision of those issues, the petition should be denied.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293



Stephen P. McCue
Attorney for Respondent

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SECRETARY OF NEW MEXICO DEPARTMENT OF CORRECTIONS;
DERALD KERBY, WARDEN, CENTRAL NEW MEXICO
CORRECTIONAL FACILITY, PETITIONERS

v.

WILLIAM SMITH, RESPONDENT

CERTIFICATE OF SERVICE

I, Stephen P. McCue, declare under penalty of perjury that I am a member of the bar of this Court and as counsel for William Smith, Respondent, that I personally mailed a copy of the Brief in Opposition to Petition for a Writ of Certiorari by first class mail, postage prepaid, to opposing counsel, Margaret McLean, at the New Mexico Attorney General's office, P.O. Drawer 1508, Santa Fe, New Mexico, 87504-1508 this 26th day of June, 1995.

SPM

Stephen P. McCue
Attorney for Respondent
Federal Public Defender
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293

FEDERAL PUBLIC DEFENDER
DISTRICT OF NEW MEXICO

Stephen P. McCue
Supervisory Assistant
Albuquerque Office
P.O. Box 449
Albuquerque, NM 87103
88001
(505) 766-3293
Fax (505) 766-3539

Ann Steinmetz
Federal Public Defender
Albuquerque

William D. Fry
Supervisory Assistant
Las Cruces Office
107 E. Lohman
Las Cruces, NM

(505) 527-6930
Fax (505) 527-6933

June 26, 1995

Mr. William K. Suter
Clerk of the Supreme Court
Supreme Court of the United States
Washington, DC 20543

94-1973

Re: Brief in Opposition to Petition for Writ of Certiorari

Dear Mr. Suter:

Enclosed please find the original and nine copies of the following documents for filing in the above captioned case:

1. Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit;

2. Motion for Leave to Proceed in Forma Pauperis; and

3. Statement of Counsel which certifies the mailing of the enclosed to this court.

Thank you for your cooperation in this regard.

Sincerely,

SPM

Stephen P. McCue
Assistant Federal Defender

SPM:lcl
Encl: as indicated
cc: Margaret McLean
Assistant Attorney General
New Mexico Attorney General's Office
P.O. Drawer 1508
Santa Fe, NM 87504-1508

RECEIVED
JUN 30 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SECRETARY OF NEW MEXICO DEPARTMENT OF CORRECTIONS;
DERALD KERBY, WARDEN, CENTRAL NEW MEXICO
CORRECTIONAL FACILITY, PETITIONERS

v.

WILLIAM SMITH, RESPONDENT

DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Stephen P. McCue, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this Court and counsel for respondent, William Smith, and that I personally mailed the response to petition for certiorari to this Court by depositing the original and nine copies in an envelope addressed to the Clerk of this Court, sealed the envelope, and deposited it in the United States mailbox at the U.S. Post Office at 500 Gold Avenue SW, Albuquerque, New Mexico, at approximately 5:00 p.m. on the 26th day of June, 1995.

SPM

Stephen P. McCue
Attorney for Respondent

ORIGINAL

Supreme Court, U.S.
FILED
AUG 18 1995
OFFICE OF THE CLERK

DISTRIBUTED
AUG 22 1995

RECEIVED
AUG 21 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 94-1978

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SECRETARY OF NEW MEXICO DEPARTMENT OF CORRECTIONS;
DERALD KERBY, WARDEN, CENTRAL NEW MEXICO
CORRECTIONAL FACILITY, PETITIONERS

v.

WILLIAM SMITH, RESPONDENT

RESPONDENT'S SUPPLEMENTAL RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent William Smith submits the following supplemental response opposing the Petition for Writ of Certiorari ("Pet.") filed by the secretary of New Mexico Department of Corrections and Derald Kerby, warden, Central New Mexico Correctional Facility.

Petitioners cited in their petition their "practical inability to retry" Mr. Smith," Pet. at 9, 10, and "irreparable prejudice suffered by the State of New Mexico" due to the lapse of time between Mr. Smith's convictions and the Tenth Circuit's vacation of the convictions. Pet. at 13. The State argued that

this Court should grant certiorari on the question of whether the Tenth Circuit erroneously failed to consider petitioners' inability to retry Mr. Smith. Pet. at 9-14. As noted in respondent's Brief in Opposition to Petition for a Writ of Certiorari, petitioners never raised this issue in the Court of Appeals and never established a factual predicate for their claim of irreparable prejudice in their ability to retry Mr. Smith.

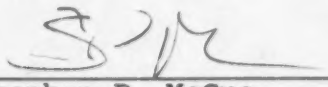
Since filing their petition in this Court, petitioners have renounced their former position that they are unable to retry Mr. Smith. In accordance with the orders of the court of appeals and the district court, petitioners had ninety days, or until July 19, 1995, "to either grant [Mr. Smith] a new trial, or, in the alternative, to order his permanent release from custody." Court of Appeals opinion herein, Appendix A to the State's petition, at 79; district court order, Attachment A hereto. On July 17, petitioners filed in the state district court a Request for Immediate Judge Assignment and Trial Date. Attachment B hereto. On July 19, 1995, the state district judge set an arraignment date and ordered that Mr. Smith remain incarcerated. Attachment C hereto. The issue of whether setting an arraignment date within ninety days constitutes "grant" of a new trial is now before the court of appeals.

This Court should deny the Petition for Writ of Certiorari for the reasons cited by Mr. Smith in his Brief in Opposition to

the Petition as well as for the reason that petitioners have now conceded that they do not suffer from "irreparable prejudice" or "practical inability to retry" Mr. Smith.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293



Stephen P. McCue
Attorney for Respondent

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SECRETARY OF NEW MEXICO DEPARTMENT OF CORRECTIONS;
DERALD KERBY, WARDEN, CENTRAL NEW MEXICO
CORRECTIONAL FACILITY, PETITIONERS

v.

WILLIAM SMITH, RESPONDENT

CERTIFICATE OF SERVICE

I, Stephen P. McCue, declare under penalty of perjury that I am a member of the bar of this Court and as counsel for William Smith, Respondent, that I personally mailed a copy of the Supplemental Response to Petition for a Writ of Certiorari by first class mail, postage prepaid, to opposing counsel, Margaret McLean, at the New Mexico Attorney General's office, P.O. Drawer 1508, Santa Fe, New Mexico, 87504-1508 this 18th day of August, 1995.

Stephen P. McCue
Attorney for Respondent
Federal Public Defender
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
95 APR 20 PM 1:37
Robert M. March
CLERK-SANTA FE

WILLIAM SMITH,

Petitioner,

vs.

No. CIV 88-241 SC/LFG

SECRETARY OF NEW MEXICO DEPARTMENT OF CORRECTIONS, DERALD KERBY, Warden, Central New Mexico Correctional Facility,

ENTERED ON DOCKET
APR 20 1995

Respondents.

ORDER

THIS MATTER is before the Court upon remand by the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit directed that the State of New Mexico, within ninety (90) days, either grant Petitioner a new trial or, in the alternative, order his permanent release from custody.

Accordingly, pursuant to the mandate of the Tenth Circuit, filed April 14, 1995, the State of New Mexico is hereby directed, within ninety (90) days of date of entry of this order, to either grant Petitioner a new trial or, in the alternative, to order his permanent release from custody.

Santiago E. Campos
UNITED STATES DISTRICT JUDGE

62

Attachment A

★ SETTING ★
on 7-19-95
CALENDARED

SECOND JUDICIAL DISTRICT COURT

COUNTY OF BERNALILLO

STATE OF NEW MEXICO

No. CR 77-29460

ENDORSED
FILED IN MY OFFICE THIS
JUL 17 1995
CLERK DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

vs.

WILLIAM SMITH,

Defendant.

REQUEST FOR IMMEDIATE JUDGE ASSIGNMENT AND TRIAL DATE

The State hereby requests that a judge be assigned immediately and that a trial date be set at some future date. This request is based on the following:

1. The defendant was charged by indictment on August 19, 1977 with two counts of first degree murder and two counts of kidnapping;

2. On February 4, 1978 a jury returned verdicts convicting the defendant of 2 counts of first degree murder and acquitted him of both counts of kidnapping;

3. The defendant was sentenced on March 9, 1978 to serve two consecutive life terms in prison;

4. In an opinion filed March 7, 1995, the United States Court of Appeals vacated the defendant's convictions and remanded the case to the United States District Court;

5. In an order filed April 20, 1995 the United States District Court directed the State of New Mexico to either grant defendant a new trial or order his permanent release from custody. The District Court's Order set a deadline of 90 days from April 20, 1995 within which to either grant a new trial or release the defendant. Ninety days from April 20, 1995 would be July 19, 1995.

Therefore the State requests that a judge be assigned to this case immediately so that the setting of a future trial date can be accomplished prior to the deadline.

Michael D. Cox
Deputy District Attorney

I hereby certify that a copy of the foregoing was sent to counsel for defendant, Peter Schoenburg, 320 Central S.W. Suite #30 87102, Albuquerque, NM, on the day of July, 1995.

Michael D. Cox
Assistant District Attorney

2345/VCM

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

MICHELLE GARCIA ENDORSED
FILED IN MY OFFICE THIS
JUL 19 1995
CLERK DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

v. No. CR-77-29460

WILLIAM SMITH,

Defendant.

ORDER

This matter came on for hearing before me the undersigned Judge of the District Court upon the State of New Mexico's Request for Immediate Judge Assignment Trial Date in this cause. The State of New Mexico appeared by Michael Cox, Cecelia Niemczyk, Steve Suttle, Deputy District Attorneys and Margaret McLean, Assistant Attorney General, the Defendant appeared in person and by counsel, Peter Schoenburg.

After due consideration of the Order entered by Hon. Santiago E. Compos, United States District Court Judge, the State's request filed July 17, 1995 and the Defendant's response thereto filed July 18, 1995, the Court finds as follows:

1. Upon stipulation of the parties, the undersigned judge will conduct all future proceedings in this cause.

2. The Court hereby finds that the request for trial setting was timely filed and the period for commencement of trial will begin to run from this date.

3. Further arraignment on the Indictment returned August 19, 1977 is hereby set for Monday July 24, 1995 at 8:30 AM. At that time this Court will consider conditions of release and set a definite trial date.

4. The Defendant is hereby remanded to the custody of the Bernalillo County Detention Center until further order of this Court.

W. John Brennan,
Judge of the District Court

APPROVED AS TO FORM:

Counsel for the State

Counsel for the Defendant

FEDERAL PUBLIC DEFENDER
DISTRICT OF NEW MEXICO

Joseph W. Gandert
Supervisory Assistant
Albuquerque Office
P.O. Box 449
Albuquerque, NM 87103
(505) 766-3293
Fax (505) 766-3539

Ann Steinmetz
Federal Public Defender
Albuquerque

William D. Fry
Supervisory Assistant
Las Cruces Office
107 E. Lohman
Las Cruces, NM 88001
(505) 527-6930
Fax (505) 527-6933

July 20, 1995

RECEIVED
JUL 24 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Mr. William K. Suter
Clerk of the Supreme Court
Supreme Court of the United States
Washington, DC 20543

Re: Smith v. New Mexico
10th Cir. No. 93-2218

Dear Mr. Suter:

Enclosed please find the original and nine copies of Respondent's Supplemental Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Sincerely,

Stephen P. McCue
Assistant Federal Public Defender
Albuquerque Office

SPM:jrg
Enclosures as indicated

cc: New Mexico Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508